

Response Under 37 C.F.R. § 41.37  
Appellant's Brief  
Application No. 08/928,272  
Paper Dated: December 22, 2011  
In Reply to USPTO Correspondence of April 26, 2011  
Attorney Docket No. 3896-092985 (P-3818)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Application No. : 08/928,272 Confirmation No. 9434  
Appellant : MICHAEL J. ISKRA  
Filed : 9/12/1997  
Title : COLLECTION CONTAINER ASSEMBLY  
Group Art Unit : 3771  
Examiner : Kristen Clarette Matter

**Mail Stop Appeal Brief - Patents**

Commissioner for Patents  
P. O. Box 1450  
Alexandria, VA 22313-1450

**APPEAL BRIEF**

Sir:

Appellant appeals the rejections set forth in the Office Action mailed on April 26, 2011. This Appeal Brief is submitted in furtherance to the Notice of Appeal electronically filed on August 19, 2011 and is in response to the Notice of Panel Decision from the Pre-Appeal Brief Review of October 25, 2011. The headings used hereinafter and the subject matter set forth under each heading are in accordance with 37 C.F.R. § 41.37. Appellant requests that the previously paid Notice of Appeal fee and Appeal Brief fee, filed November 22, 2010, be applied to this new appeal.

I hereby certify that this correspondence is being electronically  
submitted to the United States Patent and Trademark Office on  
December 22, 2011.

12/22/2011

Date

*Sharyn Beck*

Signature

Sharyn Beck

Typed Name of Person Signing Certificate

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## **TABLE OF CONTENTS**

I.	Real Party in Interest	3
II.	Related Appeals and Interferences	4
III.	Status of Claims	5
IV.	Status of Amendments	6
V.	Summary of Claimed Subject Matter	7
VI.	Grounds of Rejection to be Reviewed on Appeal	8
VII.	Argument	9
VIII.	Conclusion	17
	Claims Appendix	18
	Evidence Appendix	20
	Related Proceedings Appendix	21

Response Under 37 C.F.R. § 41.37  
Appellant's Brief  
Application No. 08/928,272  
Paper Dated: December 22, 2011  
In Reply to USPTO Correspondence of April 26, 2011  
Attorney Docket No. 3896-092985 (P-3818)

**I. REAL PARTY IN INTEREST**

Becton, Dickinson and Company, having its principal place of business at 1 Becton Drive, Franklin Lakes, New Jersey 07417, is the Assignee of the entire right, title, and interest to the above-identified application and, as such, is the real party in interest in this Appeal.

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Application No. 08/928,272  
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## **II. RELATED APPEALS AND INTERFERENCES**

This application (U.S. Patent App. Serial No. 08/928,272) was previously before the Board of Patent Appeals and Interferences in Appeal No. 2005-2410. A Decision on Appeal affirming the Examiner's rejections under 35 U.S.C. §§ 102(b) and 103(a) of the then-pending claims was mailed on September 19, 2005. A copy of this Decision is attached hereto.

There are no other appeals or interferences known to the Appellant, the Appellant's legal representative, or the Assignee of the above-identified application which may be related to, directly affect, or be directly affected by or have a bearing on the Board's decision in the pending Appeal.

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### **III. STATUS OF THE CLAIMS**

Claims 1 and 5-9 are pending in the present application and are the subject of this Appeal. Claim 1 is in independent form. Claims 1, 6, and 9 stand rejected under 35 U.S.C. § 103(a) for obviousness based on Figures 1 and 2 of the subject application, which is referred to in the Office Action as Applicant's Admitted Prior Art (hereinafter "the State of the Art"), in view of United States Patent No. 4,358,425 to Finney (hereinafter "the Finney patent" or "Finney"). Claims 5, 7, and 8 stand rejected under 35 U.S.C. § 103(a) for obviousness based on the State of the Art and Finney and further in view of United States Patent No. 5,458,854 to Burns (hereinafter "the Burns patent" or "Burns"). Each of these claims has been rejected at least twice. All other claims have been cancelled and are not part of this Appeal.

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Application No. 08/928,272  
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#### **IV. STATUS OF AMENDMENTS**

All amendments previously made to the claims have been entered. The claims have not been amended after being rejected in the April 26, 2011 Office Action. A copy of the claims, as presently pending, is provided in the Claims Appendix attached hereto.

**V. SUMMARY OF CLAIMED SUBJECT MATTER**

One representative embodiment of Appellant's invention is set forth in Claim 1. Claim 1 is directed to a one piece collection container assembly (50). (*See* Figs. 3 and 4.) The assembly (50) includes an elongate tubular housing having a sidewall (62) extending between opposed first and second ends. (*See* Figs. 3 and 4; *see also* page 4, lines 12-14 and page 8, lines 13-22.) The assembly (50) further includes a solid partition (76) in contact with the sidewall (62). (*See* FIGS. 3 and 4; *see also* page 9, lines 3-5.) The solid partition (76) is positioned within the housing between the first end and the second end. (*Id.*) The solid partition (76) forms a closed bottom. (*See* FIGS. 3 and 4; *see also* page 4, lines 14-25 and page 8, line 17 through page 9, line 6.) The housing defines a volume for specimen collection and containment therein between the first end and the partition. (*See* Figs. 3 and 4; *see also* page 4, lines 12-14 and page 8, line 24 through page 9, line 5.) The second end forms a false bottom which includes a bottom end that is below the partition. (*See* FIGS. 3 and 4; *see also* page 4, lines 14-19 and page 8, lines 19-22.) The bottom end has an annular skirt (78) and a semi-spherical bottom (80) which has an opening (82) therein. (*See* Figs. 3 and 4; *see also* page 4, lines 12-14 and page 8, lines 19-22.)

There are no other independent claims involved in this Appeal.

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Application No. 08/928,272  
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**VI. GROUND OF REJECTION TO BE REVIEWED ON APPEAL**

Based upon the rejections presented in the Office Action dated April 26, 2011, Appellant presents the following grounds of rejection to be reviewed on Appeal:

- I. Whether claims 1, 6, and 9 were properly rejected under 35 U.S.C. § 103(a) for obviousness based upon the State of the Art in view of the Finney patent.
- II. Whether claims 5, 7, and 8 were properly rejected under 35 U.S.C. § 103(a) for obviousness based upon the State of the Art in view of the Finney patent and the Burns patent.



## **VII. ARGUMENT**

All of the presently pending claims were improperly rejected in the Office Action. In general, the Office Action fails to demonstrate that it would have been obvious, at the time the claimed collection container assembly was invented, to modify known false bottom specimen collection tubes to include a bottom end comprising an annular skirt and a semi-spherical bottom with an opening therein. Instead, the conclusions drawn by the Examiner in rejecting the claims are the product of an improper attempt to reconstruct the claims through hindsight reasoning.

For at least this reason, which is discussed in greater detail hereinafter, Appellant respectfully requests that the Board overturn the rejections of the Examiner, and remand this matter to the Examiner with instructions to reopen prosecution and allow the currently pending claims.

### **I. CLAIMS 1, 6, AND 9 WERE IMPROPERLY REJECTED UNDER 35 U.S.C. § 103(a) FOR OBVIOUSNESS BASED ON THE STATE OF THE ART IN VIEW OF FINNEY**

Claims 1, 6, and 9 stand rejected under 35 U.S.C. § 103(a) for obviousness based on the State of the Art in view of the Finney patent. In view of the following remarks, Appellant respectfully requests reversal of this rejection.

#### **A. The Scope and Content of the Prior Art**

##### **1. The State of the Art**

As explained in the subject application, Figs. 1 and 2 of the subject application show a prior art false bottom specimen container (10), having a sidewall (12) with an outer surface (14) and an inner surface (16). The sidewall (12) extends from an upper portion (18) of the container (10) to a lower portion (20) of the container (10). The upper portion (18) includes an open end (22) and a rim (24). The lower portion (20) includes a closed bottom end (26). An annular skirt (28) extends from the lower portion (20) and the outer surface (14) to a flat planar bottom end (30) to define a false bottom (32). The interior volume (34) of the container (10) extends between the rim (24) and the closed bottom end (26).

## 2. The Finney Patent

The Finney patent is directed to a centrifuge tube which is useful for obtaining analytical samples. (Finney, col. 1, lines 5-8.) The centrifuge tube (10) of Finney has a rounded bottom (12) containing a passageway (14). (Finney, col. 2, lines 17-19.) A recess (16) co-axial with the passageway (14), is provided on the inner side of the tube (10) and another recess (18), also co-axial with the passageway (14), is provided on the outer side of the tube (10). (Finney, col. 2, lines 19-22.) A tight fitting, resilient plug (20) is disposed in the passageway (14), and the plug (20) provides a leak-tight closure for the passageway (14) and the recesses (16, 18). (Finney, col. 2, lines 26-35.) The plug (20) is pierceable by a hypodermic syringe (26). (Finney, col. 2, line 39.) This centrifuge tube arrangement allows for a sedimentation fraction that has accumulated at the bottom of the tube to be removed through the bottom of the tube (rather than through the top of the tube) by piercing the plug with the needle of the hypodermic syringe and drawing out the fraction which has settled at the bottom of the tube. (Finney, col. 2, lines 36-41.) Finney states “[i]n this way, the constituents of a desired strata may be withdrawn from the tube without having it remix with adjacent layers.” (Finney, col. 2, lines 41-43.) Finney proffers that this apparatus satisfied a need in the art for a puncturable-bottom centrifuge tube which is transparent and which can withstand forces in the region of 150,000 G’s. (Finney, col. 1, lines 56-59.) Finney is clearly not directed to a false-bottomed container, despite the assertions in the Office Action to the contrary.

### **B. The Flat Bottom Edge Shown in Figs. 1 and 2 of the Subject Application is Clearly Distinct from the Semi-Spherical Bottom with an Opening Therein of Claim 1**

Independent claim 1 defines a one piece collection container assembly comprising an elongate tubular housing. With respect to the elongate tubular housing, claim 1 recites, in relevant part, “said second end [of the elongate tubular housing] forming a false bottom comprising a bottom end below said partition, said bottom end comprising an annular skirt and a semi-spherical bottom, wherein said semi-spherical bottom comprises an opening therein” (emphasis added).

The Examiner asserts that Figs. 1 and 2 of the subject application, which are described as showing false bottom specimen tubes of the prior art, disclose a one piece collection container assembly having an elongate tubular housing (12) having opposed first and second ends (at 24 and 36), and a solid partition contacting a sidewall (12) of the tube forming a closed bottom (26) and positioned within said housing between the first and second ends (as shown in Figs. 1 and 2). The Examiner further contends that the housing defines a volume for specimen collection and containment therein between the first end and said partition, the second end forming a false bottom (32) having a bottom end below the partition having an annular skirt (28) having an opening (36) therein.

The Examiner recognizes, however, that at the time of Appellant's invention, the State of the Art did not include a false-bottomed tube where the bottom of the tube is semi-spherical. This recognized deficiency is confirmed by reference to, for instance, Figs. 1 and 2 of the subject application, each of which shows a container having a flat, or planar, bottom end (30) formed from the annular skirt (28). This deficiency is discussed in lines 18-23 of page 3 of the specification as filed.

Thus, there exists a clear and recognized difference between the claimed container design and the container designs known at the time the subject application was filed. Specifically, where existing false bottom containers had a flat bottom edge, the bottom end of the claimed collection container comprises a semi-spherical bottom with an opening therein.

**C. The Asserted Reasons for Modifying the State of the Art do not Support a Finding of Obviousness**

Despite the recognized differences between the State of the Art and what is recited in claim 1, the Examiner concluded that the claims do not define over the prior art. In particular, the Examiner asserted that it would have been obvious, in view of Finney, to modify known false bottom collection containers (like that shown in Figs. 1 and 2 of the subject application) to include a bottom edge that is semi-spherical. However, the rationale provided to support this conclusion is insufficient to establish a *prima facie* case of obviousness and

inconsistent with the actual teachings of the cited art. Therefore, the rejection under 35 U.S.C. § 103(a) is improper and should be reversed.

First, in the paragraph bridging pages 3 and 4 of the Office Action, the Examiner concludes that “absent a critical teaching and/or showing of unexpected results from the tube having a semi-spherical bottom,” modifying the bottom end of the tube shown in Figs. 1 and 2 of the subject application so that it is semi-spherical is “an obvious design consideration” that does not patentably distinguish over the prior art. However, as the Examiner acknowledges in the same paragraph, “[c]hanging the bottom to a semi-spherical shape would allow the tube to be compatible with common standard clinical equipment and instrumentation depending on the exact intended use of the tube.” In other words, the Office Action acknowledges that the inventive feature of the claimed design is critical because it allows the claimed false-bottomed collection tube, despite having a false-bottom, to be used in standard clinical equipment. This was not possible with prior art false bottom tubes, such as the tube shown in FIGS. 1 and 2 of the subject application. When, like here, the modification of the shape of the claimed object changes the operation of the object, the change is not a “mere design choice” as the Examiner contends. *See* M.P.E.P. § 2144.04 VI. C.

In any event, simply because one skilled in the art could modify the shape of a prior art device to meet the terms of the claims is not by itself sufficient to support a finding of obviousness. Instead, the Examiner must provide some motivation or reason for the skilled artisan, without having the benefit of applicant's specification, to make the necessary changes in the reference device. *Ex parte Chicago Rawhide Mfg. Co.*, 223 USPQ 351, 353 (Bd. Pat. App. & Inter. 1984). Here, the additional reasoning presented by the Examiner to explain why it would have been obvious to make this modification of the prior art does not rectify this deficiency.

The Examiner attempts to support the conclusion that it would be obvious to modify the bottom end of the tube shown in Figs. 1 and 2 of the subject application so that it is semi-spherical by asserting that Finney, and more particularly Fig. 1 and the abstract of Finney, discusses how such a semi-spherical shape allows the tube to be used in the cavity of a centrifuge rotor. However, the Finney patent does not support the conclusion that it would be obvious to

change the bottom of an otherwise flat container to have a semi-spherical shape. The abstract of Finney, which is cited by the Examiner, is reproduced in its entirety below:

A transparent tube for use in the cavity of the rotor of a high speed centrifuge. The tube is penetrable at its bottom end by a needle of a hypodermic syringe. The tube is open at the top and has a rounded bottom with an opening forming a passageway therein. A recess forming a shoulder co-axial with the passageway is provided both on the inner side and the outer side of the tube. A resilient plug having flanges at each end provides a tight fitting closure for the passageway and recesses.

There is nothing in this passage that suggests, let alone teaches, that the shape of the bottom of the tube is what allows the tube to be useable in the cavity of a centrifuge rotor. The statement regarding the use of the tube in the cavity of the rotor and the separate statement that the tube has a rounded bottom are independent from one another, and together do not imply that only rounded bottom tubes can be used in a centrifuge. In other words, just because the tube is used in a centrifuge and has a rounded bottom, it does not necessarily follow that tubes not having a rounded bottom could not be used in a centrifuge. Indeed, the preferable use of the container in the Burns patent (U.S. Patent No. 5,458,854), which does not have a rounded bottom, is in a micro-centrifuge (Burns, col. 2, lines 43-44) or, with the aid of a flat-bottomed extension, in a normal centrifuge (Burns, col. 5, lines 13-17).

Finney discusses the prior art centrifuge tube with a penetrable bottom of United States Patent No. 3,875,012 to Dorn. Finney describes the Dorn tube as being "essentially a right circular cylindrical closed by a resilient stopper at each end" (Finney, col. 1, lines 46-47). Finney states that the Dorn tube is unsuited for use at forces above 6,000 G's because the straight-sided design that is employed by Dorn cannot withstand high forces without leaking. (Finney, col. 1, lines 49-55). However, this is not a justification for modifying false bottom containers, like those taught in Burns and defined in claim 1, because these false bottom containers are not designed to carry a liquid in the false-bottomed portion, as evidenced by the fact that they include an opening in the bottom thereof. Therefore, one skilled in the art reading Finney's suggestion that a rounded bottom be used to avoid leaks at high centrifugal speeds

would not find this discussion relevant with respect to false bottom containers since this design would not provide any advantage to such a false bottom container. Moreover, the fact that Finney discusses Dorn's right circular cylinder centrifuge tube without any mention that this shape is not compatible with common standard centrifuge equipment further rebuts the Examiner's position that Finney teaches that a rounded bottom shape allows the tube to be used in the cavity of a centrifuge rotor.

Considering the actual teachings of Finney, the Examiner's conclusion that a tube with a rounded bottom allows for compatibility with clinical equipment appears to be based not on Finney, but rather on the specification of the subject application itself. Indeed, the subject specification states that a "further advantage of the assembly of the present invention is that it provides a specimen collection container which is universally compatible with various clinical equipment and instrumentation" (Specification, page 5, lines 21-26). Of course, it is axiomatic that the obviousness determination cannot be based on knowledge gleaned from applicant's disclosure but must instead be based on the state of the art at the time the subject application is filed. *In re McLaughlin*, 443 F.2d 1392, 1395, 170 USPQ 209, 212 (CCPA 1971). Thus, this rationale fails to support a finding of obviousness.

The Examiner, on page 4 of the Office Action, also contends that Finney discloses a specimen collection tube with a rounded, semi-spherical false bottom. However, this is incorrect as Finney fails to disclose or suggest a specimen collection tube with a rounded, semi-spherical false bottom. Instead, Finney discloses a centrifuge tube (10) containing a passageway (14) and a tight fitting, resilient plug (20) disposed in the passageway (14) which provides a leak-tight closure for the passageway (14). (Finney, col. 2, lines 26-35.) The plug (20) is pierceable by a hypodermic syringe (26). (Finney, col. 2, line 39.) There is nothing in Finney which could even be arguably identified as a false bottom. Simply put, Finney fails to disclose or suggest a false bottom portion. Thus, the Examiner is incorrect in this regard as well.

Stripping away these inaccurate representations concerning the teachings of the Finney patent, the Examiner is left with the conclusion that changing the shape of the design in Figs. 1 and 2 to make it semi-spherical constitutes an "obvious" design consideration. However,

Response Under 37 C.F.R. § 41.37  
Appellant's Brief  
Application No. 08/928,272  
Paper Dated: December 22, 2011  
In Reply to USPTO Correspondence of April 26, 2011  
Attorney Docket No. 3896-092985 (P-3818)

this statement simply assumes what it purports to explain. Namely, why, based on evidence of record, it would be obvious to modify this design to include a semi-spherical bottom end. Such unsupported and unreasoned rejections are exactly the type the Federal Circuit and Supreme Court have warned against. *See In re Kahn*, 78 USPQ.2d at 1336 (“rejections on obviousness cannot be sustained with mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.”); *see also KSR Intern. Co. v. Teleflex Inc.*, 550 U.S. 398, 415, 82 USPQ.2d 1385, 1396 (2007) (quoting Federal Circuit statement from *Kahn* with approval). Therefore, this rationale fails to support a *prima facie* case of obviousness.

Moreover, even if the references are properly combined, the teachings of these references as a whole do not render all of the claim features obvious. As noted, the claimed invention recites a semi-spherical bottom with an opening therein. The bottom end of the Finney tube, however, does not contain an opening therein, which is recited in the claimed container. Instead, Finney discloses a closed bottom container, incorporating a tight fitting, resilient plug, pierceable by a hypodermic syringe, disposed in a passageway to provide a leak-tight closure. Indeed, the Finney tube cannot have an opening in the bottom end because Finney is not directed to a false bottom container. If Finney contained an opening in the bottom end, the contents in the container would simply fall right through. On the other hand, a false bottom container can have an opening in the bottom end due to the partition located between the top end and bottom end which forms the “true” bottom of the container. Thus, modifying known prior art false bottomed containers to have the bottom end of Finney (as proposed in the Office Action) would fail to meet the limitation in the claims directed to the opening in the bottom end of the container.

Therefore, the rejection of claims 1, 6, and 9 under 35 U.S.C. § 103(a) for obviousness based on Figs. 1 and 2 of the subject application in view of Finney is improper and should be reversed.

Response Under 37 C.F.R. § 41.37  
Appellant's Brief  
Application No. 08/928,272  
Paper Dated: December 22, 2011  
In Reply to USPTO Correspondence of April 26, 2011  
Attorney Docket No. 3896-092985 (P-3818)

**II. CLAIMS 5, 7, AND 8 WERE IMPROPERLY REJECTED UNDER 35 U.S.C. § 103(a) FOR OBVIOUSNESS BASED ON THE STATE OF THE ART AND FINNEY AND FURTHER IN VIEW OF BURNS**

Claims 5, 7, and 8 stand rejected under 35 U.S.C. § 103(a) for obviousness based on the State of the Art and Finney and further in view of United States Patent No. 5,458,854 to Burns. These claims depend from claim 1. Because additional reference to Burns fails to cure the deficiencies of the State of the Art and Finney discussed above, this rejection is also improper. In fact, Burns teaches away from claim 1 by specifically requiring that the bottom end of the tube includes a cylindrical shape for receiving a portion of the cap thereon. (Burns, column 5, lines 7-12). Therefore, this rejection should also be reversed.



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Application No. 08/928,272  
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Attorney Docket No. 3896-092985 (P-3818)

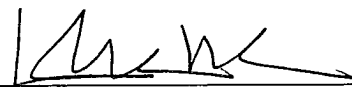
### **VIII. CONCLUSION**

For the reasons set forth above, Appellant submits that claims 1 and 5-9 are indeed patentable over the cited art and are in condition for allowance. Reversal of all of the Examiner's rejections and remand of this case to the Examiner are respectfully requested.

Appellant's fee of \$540.00 paid on November 22, 2010 in connection with the submission of an Appeal Brief on that date is believed to cover the fee required for submission of this Appeal Brief, and thus no fee is believed to be due. However, the Commissioner of Patents and Trademarks is hereby authorized to charge any additional fees which may be required to Deposit Account Number 23-0650. Please refund any overpayments to Deposit Account Number 23-0650.

Respectfully submitted,

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**CLAIMS APPENDIX**

1. A one piece collection container assembly comprising:  
  
an elongate tubular housing having a sidewall extending between opposed first and second ends; and  
  
a solid partition in contact with said sidewall, positioned within said housing between said first and second ends, forming a closed bottom;  
  
said housing defining a volume for specimen collection and containment therein between said first end and said partition;  
  
said second end forming a false bottom comprising a bottom end below said partition, said bottom end comprising an annular skirt and a semi-spherical bottom, wherein said semi-spherical bottom comprises an opening therein.
5. The assembly of Claim 1, wherein said partition is arcuate in shape to provide said volume for specimen collection with at least a partially rounded bottom portion.
6. The assembly of Claim 1, wherein said partition is conical in shape.
7. The assembly of Claim 1, wherein said housing is a thermoplastic polymer.

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Appellant's Brief  
Application No. 08/928,272  
Paper Dated: December 22, 2011  
In Reply to USPTO Correspondence of April 26, 2011  
Attorney Docket No. 3896-092985 (P-3818)

8. The assembly of Claim 7, wherein said thermoplastic polymer is polyethylene terephthalate, polypropylene, polyethylene naphthalate, polyvinyl chloride or copolymers thereof.

9. The assembly of Claim 1, wherein said housing comprises an outer diameter, a length and an internal volume, wherein said outer diameter is about 13 to about 16 millimeters, said length is about 75 to about 100 millimeters and said internal volume is about 1 to about 3 milliliters.

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Appellant's Brief  
Application No. 08/928,272  
Paper Dated: December 22, 2011  
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Attorney Docket No. 3896-092985 (P-3818)

**EVIDENCE APPENDIX**

None.

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Application No. 08/928,272  
Paper Dated: December 22, 2011  
In Reply to USPTO Correspondence of April 26, 2011  
Attorney Docket No. 3896-092985 (P-3818)

**RELATED PROCEEDINGS APPENDIX**

1. A copy of the Decision on Appeal of Appeal No. 2005-2410, mailed September 19, 2005, concerning United States Patent Application No. 08/928,272, is appended hereto.

The opinion in support of the decision being entered today was not written  
for publication and is not binding precedent of the Board.

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

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Ex parte MICHAEL J. ISKRA

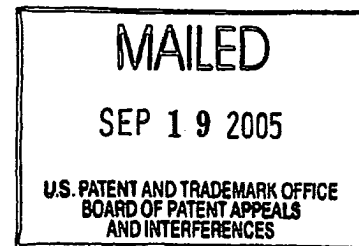
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Appeal No. 2005-2410  
Application No. 08/928,272

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ON BRIEF

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Before GARRIS, PAK, and JEFFREY T. SMITH, Administrative Patent Judges.  
JEFFREY T. SMITH, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1 and 5  
to 9, all of the pending claims. (Brief, p. 2). We have jurisdiction under 35 U.S.C.  
§ 134.

BACKGROUND

The present invention relates to a one piece collection container assembly. The container comprises a tubular housing having opposed first and second ends and a solid partition within the housing. (Brief, p. 2). Representative claim 1 appears below:

1. A one piece collection container assembly comprising:  
an elongated tubular housing having opposed first and second ends; and  
a solid partition positioned within said housing between said first and second ends;  
said housing defining a volume for specimen collection therein between said first end and said partition;  
said second end comprising a bottom end below said partition, said bottom end comprising a rounded bottom having an opening therein.

The Examiner relies on the following reference in rejecting the appealed claims:

Burns	5,458,854	Oct. 17, 1995
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Claims 1, 5, 7 and 8 stand rejected under 35 U.S.C. § 102(b) over Burns; and claims 6 and 9 stand rejected under 35 U.S.C. § 103(a) over Burns. (Answer, pp. 3-5). We affirm the rejections.

Rather than reiterate the conflicting viewpoints advanced by the Examiner and the Appellant regarding the above-noted rejections, we make reference to the Answer (mailed September 17, 2003) for the Examiner's reasoning in support of the rejection, and to the Brief (filed July 7, 2003) for the Appellant's arguments there against.

OPINION<sup>1</sup>

Upon careful review of the respective positions advanced by Appellant and the Examiner, we affirm for the reasons advanced by the Examiner and add the following primarily for emphasis.

Claims 1, 5, 7 and 8 stand rejected under 35 U.S.C. § 102(b) over Burns. We will limit our discussion to the subject matter of claim 1.

Appellant's principal argument is that Burns does not disclose a bottom end that is below the solid partition comprising a rounded bottom with an opening. (Brief p. 3). We do not agree. Appellant is free to recite features of his invention based on the structure. However, when describing the invention, the inventor must describe this specifically to avoid the prior art. In the instant case, the Appellant has chosen to describe the second end portion as "comprising a bottom end below said partition, said bottom end comprising a rounded bottom having an opening therein." The specimen container of Burns is a cylindrical tube in shape comprising two ends having a partition located there between. The cylindrical tube container is rounded at

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<sup>1</sup> Appellant asserts that for purposes of appeal that claims 1, 5 to 9 stand or fall together. (Brief, p. 2). We note that claims 6 and 9 are separately rejected by the Examiner. We will consider the rejections as presented by the Examiner.



both ends (i.e., the cross-section is round). Thus, the container of Burns anticipates the subject matter of claim 1 as presented.<sup>2</sup>

Claims 6 and 9 stand rejected under 35 U.S.C. § 103(a) over Burns.

Appellant has not specifically challenged the obviousness of using a partition with a conical shape or the selection of particular dimensions for the specimen container as asserted by the Examiner. Thus, it appears that Appellant is relying on the arguments presented in response to the previous rejection. These arguments are not sufficient to overcome the Examiner's rejection for the reasons presented above and the reasons presented in the Answer.

#### CONCLUSION

For the foregoing reasons and those set forth in the Answer, giving due weight to Appellant's arguments, we determine that the preponderance of evidence weighs in favor of the Examiner's rejections. Accordingly, the Examiner's rejections under 35 U.S.C. §§ 102(b) and 103(a) are affirmed.

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<sup>2</sup> The description of a test tube, such as routinely used in basic Chemistry class, as "a cylindrical tube with a rounded end" does not differentiate between the top open end and the closed bottom end.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a)(1)(iv)(effective Sep. 13, 2004; 69 Fed. Reg. 49960 (Aug. 12, 2004); 1286 Off. Gaz. Pat. Office 21 (Sep. 7, 2004)).

  
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Appeal No. 2005-2410  
Application No. 08/928,272

Page 6

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